Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Public Interest Obligations)
of TV Broadcast Licensees)

MM Docket No. 99-360

COMMENTS OF

OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST
ALLIANCE FOR COMMUNITY MEDIA
ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS
BENTON FOUNDATION
BLACK CITIZENS FOR A FAIR MEDIA
CENTER FOR MEDIA EDUCATION
CONSUMERS UNION
MINORITY MEDIA TELECOMMUNICATIONS COUNCIL
NATIONAL ASSOCIATION OF THE DEAF
WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS, (UCC *et al.*)

Of Counsel:

Fernando A. Bohorquez, Jr
Graduate Fellow
Georgetown University Law Center

Kristen Enge
Law Student
Georgetown University Law Center

Anthony Cavalluzzi
Law Student
Georgetown University Law Center

Angela J. Campbell
Citizens Communications Center
INSTITUTE FOR PUBLIC
REPRESENTATION
Georgetown University Law Center
600 New Jersey, Ave. N.W., Ste. 312
Washington, D.C. 20001

Andrew J. Schwartzman
Harold Feld
Media Access Project
~~950 18~~[th] Street, N.W., Ste. 220
Washington, D.C. 20006

Counsel for UCC *et al.*

March 27, 2000

SUMMARY

UCC *et al.* collectively represent a broad spectrum of the viewing and listening public. As such, UCC *et al.* have a strong interest in ensuring a diversity of sources of information about important local issues, maintaining an informed electorate, meeting the educational and informational needs of children and making sure that digital television is accessible to all. Digital television broadcast licensees have a statutory obligation to provide their communities with programming that serves the public interest. 47 U.S.C. §§ 307(b), 309, 336(d).

UCC *et al.* urge the Commission to issue a Notice of Proposed Rulemaking ("NPRM") no later than August 2000 proposing public interest obligations for digital broadcasters. The Commission should then act expeditiously to adopt such rules so that the public can truly benefit from the opportunities presented by digital television ("DTV"). To ensure that digital licensees adequately serve the public interest, UCC *et al.* urge the Commission to propose and adopt the following five recommendations:

First, UCC *et al.* recommend that the Commission establish quantitative minimum public interest requirements for all digital broadcast licensees. Adopting minimum requirements is an integral component of translating existing public interest obligations to the digital environment. A broadcast licensee has a fundamental duty to air programming responsive to the needs of its community. This principle is too important to leave to the vicissitudes of the market, especially in light of evidence that continues to demonstrate that some broadcasters are <u>not</u> meeting this responsibility. The Commission must adopt minimum standards to ensure that <u>all</u> licensees serve this vital role. Despite the emergence of new media outlets, such as cable, DBS and the Internet, broadcast television remains the principal source of information on issues of local public

importance.

To secure the public's informational rights, the Commission should adopt programming guidelines for local news and public affairs, candidate centered discourse and programming furthering self-governance, and children's educational programming. The Commission also should expand minimum closed captioning requirements to encompass all public interest programming and phase in video description to enhance access for persons with disabilities. In addition, the Commission should strengthen broadcasters' equal employment opportunity outreach and recruitment obligations. Lastly, the Commission should require digital broadcasters to file periodic reports with the FCC detailing how they have met these obligations.

Second, the Commission should develop additional public interest obligations commensurate to a digital broadcaster's enhanced capability to multicast. The current rules, based on the assumption that a licensee provides a single channel of programming, will not satisfy the public's needs in the digital environment. These additional obligations should be flexible, enabling the digital licensee to determine how best to serve its community should it choose to multicast. UCC *et al.* propose that the Commission offer broadcasters three options to satisfy their enhanced public interest obligations: 1) provide additional public interest programming; 2) lease a portion of the spectrum to a small disadvantaged business or noncommercial educational producer; or 3) pay a fee to support local noncommercial educational programming.

Third, the Commission should specifically apply certain existing public interest obligations to all program services, including ancillary and supplemental program services. In particular, the Commission should ensure that a digital licensee meet its candidate access rights

and children's advertising requirements on all program services, whether free or pay.

Fourth, the Commission should ensure that the public interest is served on all non-programming ancillary and supplemental services. Digital broadcasters could meet their public interest obligations by providing a certain amount of datacasting services to local schools and libraries and non-profit community organizations. The Commission should also explore the possibility of allowing digital licensees to meet their public interest obligations on ancillary services by providing broadband Internet access to needy schools, libraries, and/or community centers. In addition, the Commission must ensure that all ancillary and supplemental services, programming and non-programming, are accessible to the disabled.

Finally, the Commission should take action to ensure that broadcasters do not use DTV's interactive capabilities to invade consumer privacy and take advantage of children. To protect consumer privacy, the Commission should adopt a rule preventing DTV broadcasters from collecting personal information unless consumers "opt-in" after adequate notice.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Public Interest Obligations	)	MM Docket No. 99-360
of TV Broadcast Licensees	)	

COMMENTS OF UCC *et al.*

The Office of Communication, Inc. of the United Church of Christ, Alliance for Community Media, Association of Independent Video and Filmmakers, Benton Foundation, Black Citizens for a Fair Media, Center for Media Education, Consumers Union, Minority Media Telecommunications Council, the National Association of the Deaf, and the Women's Institute for Freedom of the Press, ("UCC *et al.*") by their attorneys, the Institute for Public Representation and the Media Access Project, respectfully submit this comment in response to the Federal Communications Commission's Notice of Inquiry on the Public Interest Obligations of TV Broadcast Licensees, FCC 99-360 (rel. Dec. 20, 1999) ("*NOI*").

UCC *et al.* collectively represent a broad spectrum of the viewing and listening public. As such, UCC *et al.* have a strong interest in ensuring a diversity of sources of information about important local issues, maintaining an informed electorate, meeting the educational and informational needs of children and making sure that digital television is accessible to all. Broadcast licensees have a statutory obligation to provide their communities with programming that serves the public interest. 47 U.S.C. §§ 307(b), 309, 336(d). UCC *et al.* urge the Commission to issue a Notice of Proposed Rulemaking ("NPRM") no later than August 2000 proposing public interest obligations for digital broadcasters. The Commission should then act

expeditiously to adopt such rules so that the public can truly benefit from the opportunities presented by digital television ("DTV").

I. THE COMMISSION SHOULD ACT NOW TO PROPOSE AND ADOPT COMPREHENSIVE PUBLIC INTEREST REQUIREMENTS.

It is time for the Commission to set the ground rules for how digital broadcasters will serve the public interest. Even if the specific nature of all new services and the exact speed of deployment is uncertain, the Commission has sufficient information regarding the likely services digital broadcasters may offer to set the basic ground rules for public service. Furthermore, the speed of deployment makes delay untenable -- the Commission should not ask the public to wait for the public service owed to it by digital broadcasters, while digital broadcasters reap the rewards of the spectrum granted to them for free. Contrary to the arguments of some groups, defining digital broadcasters' public interest obligations will neither stifle development of innovative services nor retard deployment. Broadcasters also have been on notice since 1996 that, as trustees of the public spectrum in the digital age, they will have to provide for the public interest on all their digital services. Thus, UCC *et al.* ask the Commission to issue an NPRM on the public interest obligations of digital licensees as soon as possible, but no later than August 2000.

A. As Public Trustees, Broadcasters Must Use the Digital Spectrum's Enhanced Capabilities to Better Serve the Public Interest.

In the 1996 Telecommunications Act, Congress affirmed over sixty years of Court and Commission history establishing that a broadcaster must air programming responsive to the

needs of its community.[1] Digital broadcasters were granted licenses to use the spectrum in exchange for public service. *See* 47 U.S.C. § 336(d). In fact, during the hearings leading up to the Act, high level industry officials repeatedly rebuffed any notion of a digital spectrum fee, arguing that it would violate the "social compact" between the public and the broadcasters. *See* Henry Geller, *Implementation of "Pay" Models and the Existing Public Trustee Model*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST 227, at 233 (1998).

Because of their status as trustees, broadcasters received special treatment in the transition to digital. Only incumbent licensees were given the opportunity to obtain digital broadcast licenses. *See* 47 U.S.C. § 336(a)(1). Although other parties who seek to use the spectrum have to compete in auctions to obtain a license, digital broadcasters are specifically exempted from any competition. *See* 47 U.S.C. § 309(j)(2)(B). In addition, other parties must pay to use the spectrum, whereas broadcasters were not required to pay one cent for a public resource worth an estimated 70 billion dollars. With all the new capabilities and additional sources of revenue inherent in DTV, there is only one clear beneficiary of the transition to digital at the moment: the DTV broadcasters themselves. The Commission must adopt public interest

---

[1] *See* 47 U.S.C. §§ 336(d), 307(b), 309; *CBS v. FCC*, 453 U.S. 367 (1981); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 364 (1969); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 206, 306, *cert. denied*, 350 U.S. 1007 (D.C. Cir. 1956); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Requirements for Commercial Television Stations, *Report and Order*, 98 F.C.C. 2d 1076 (1984) ("*Revision of Programming Commercialization Policies*"); Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 Rad. Reg. 1901 (1960) ("*1960 Programming Policy Statement*").

obligations now to ensure that the public, as well as the broadcasters, will benefit from the transition to digital television.

B. Establishing Ground Rules Sooner Rather than Later Benefits Broadcasters As Well As the Public.

It is more equitable to broadcasters and the communities they serve to determine from the beginning exactly what will be expected from digital licensees in the near future. Broadcasters are well aware that they are required to serve the public interest and have been "on notice that the Commission may adopt new public interest rules for television." Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, 12830 (1997) ("*Fifth Report and Order*"). By adopting rules now that establish public interest obligations, broadcasters will be better able to plan to meet those obligations. As one of the broadcasters on the Advisory Committee noted, "[i]n return for a license to use a public asset for private financial gain, a broadcaster agrees to serve the public interest . . . *As with all contracts, both parties to the agreement need to know exactly the responsibilities that they have to each other.*" Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters* (1998) ("*Advisory Committee Report*"), Separate Statement of James Goodmon at 86 (emphasis in original).

Public interest obligations are absolutely necessary for the public good. Broadcasters are charged with informing the citizens of their communities of issues of local and national importance. This responsibility is fundamental regardless of whether the licensee is transmitting

in analog or digital. The fact that technology is evolving is no excuse for declining to adopt baseline public interest obligations for digital television. There are areas where the Commission knows from experience that the market will fail to serve the public interest and the Commission will need to step in. *See, e.g., ACT v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987) ("[t]he FCC's regulation of children's television was founded on the premise that the television marketplace does not function adequately when children make up the audience.").

Regulatory certainty will not stifle innovation; rather, it will encourage broadcasters to move forward. With the knowledge of what is expected from them up front, DTV licensees can tailor their use of the spectrum accordingly. This is preferable to having to impose public interest obligations after DTV broadcasters have become entrenched.

C. The Commission Has Sufficient Knowledge of How Broadcasters Will Use their Digital Capacity to Establish a Flexible and Fair Regulatory Scheme.

Notwithstanding that the specific nature of all new services and the exact speed of deployment is uncertain, the Commission has sufficient information regarding the likely services digital broadcasters may offer to establish the baseline for public service.[2] As the Commission has made clear, DTV broadcasters will provide at least one free channel comparable to the one on which the public has come to rely. *See Fifth Report and Order*, 12 FCC Rcd at 12820. In addition, it is also clear that most broadcasters will provide some conventional, albeit enhanced, television services, either on HDTV or multicasted as SDTV. *See Digital Television '99:*

---

[2] *See* Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, MM Dkt. No. 97-247, *Memorandum Opinion and Order*, FCC 99-362, at ¶ 13 (rel. Nov. 24, 1999) (discussing how "broadcasters are not venturing into completely uncharted territory" with respect to the provision of ancillary services).

Navigating the Transition in the US, <http://www.nab.org/Research/Reports/DIGITALTV.htm> (last visited Mar. 17, 2000). With the interactive potential of DTV, broadcasters can target advertisements and insert hyper-links into programming and ads to allow viewers to directly purchase products. In fact, many digital broadcasters and digital cable providers have already begun experimenting with this technology. *See* discussion *infra,* Part VI.

DTV allows for a broad range of datacasting services.[3] With the ability to datacast, "the broadcast television industry can readily participate in [the] rapidly emerging bandwidth marketplace." [4] According to one NAB senior vice president, "anything distributed over the Internet can be distributed via broadcast television" and "broadcasters are favored with several Internet competitive advantages, including currently deployed network, wireless distribution, ubiquity in the local market, cost-effectiveness in scale and the ability to support IP multicasting." *See* Ducey, *supra* note 3. In sum, DTV licensees will use the spectrum to broadcast in HDTV, to multicast in SDTV, to provide Internet or other data services or, more than likely, some combination of all the above.[5]

---

[3] *See generally*, Richard V. Ducey, *Internet +DTV Broadcasting = UN-TV*, <http://www.nab.org/research/Reports/DTV-Internet.asp> (last visited Mar. 9, 2000) (discussing the wide array of non-traditional services DTV can provide such as offering Internet bandwidth and DTV's market advantages in this area). *See also Digital Television '99: Navigating the Transition in the US*, <http:nab.org/Research/Reports/DIGITALTV.htm> (last visited Mar. 17, 2000).

[4] *See* Ducey, *supra* note 3. In fact, broadcasters are already forming partnerships to enter the digital datacasting arena. *See* Glen Dickson, *IBlast Makes Datacast Splash*, BROADCASTING AND CABLE, Mar. 13, 2000, at 62; Jon Healey, *Co-op Offers Airwave Action,*<http://www.mercury center/news/indepth/docs/bcast032200.htm> (last visited Mar. 24, 2000).

[5] Any public interest obligations the Commission adopts are reviewable if changed circumstances should arise. The public interest standard is a supple instrument that the Commission can modify

Thus, the Commission has an adequate basis to adopt a regulatory scheme that ensures that the public benefits from the broadcasters' use of the public airwaves. The public has entrusted digital licensees with an incredibly valuable resource, and the broadcasters must act as trustees to use that resource in the interest of the public. The Commission should not ask the public to wait for the public service owed to it by digital broadcasters, while digital broadcasters reap the rewards of the public spectrum. The number of stations broadcasting in digital recently topped 120, covering over 60% of all television households. *See Two More Television Stations Go Digital, NAB Says*, <http://www.nab.org/newsroom/pressrel/Releases/1400.asp>(last visited Mar. 17, 2000). At this pace, broadcasters are likely to meet the 2002 deadline for construction of digital stations. *See Id.*

The Commission should not sit idly by as the industry transfers into digital. Congress has entrusted to the Commission the duty to ensure that this valuable resource is used in the best interests of the public. The Commission should issue an NPRM proposing digital licensee's public interest requirements by August 2000 and should quickly move to adopt the rules. The following sets forth four recommendations to aid the Commission in this task.

II. THE COMMISSION SHOULD ESTABLISH CLEAR MINIMUM PUBLIC INTEREST REQUIREMENTS AND GUIDELINES.

The NOI notes that "[b]oth the Act and the Commission's implementing regulations make it clear that DTV broadcasters must continue to serve the public interest." *NOI* at ¶ 10. We agree. As a public trustee, all of a digital broadcaster's uses of the spectrum must be in the public interest. *See* 47 U.S.C. § 336(d). In light of the "new capabilities in digital technology,"

---

as technology or social needs require. *See CBS v. DNC*, 412 U.S. 94, 118 (1973).

the initial question the NOI asks is "how existing public interest obligations should translate to the digital medium." *NOI* at ¶ 10. As part of the translation to digital, the NOI seeks comment on whether the Commission should establish more specific minimum requirements or guidelines regarding television broadcasters' public interest obligations. *See NOI* at ¶ 22.

A broadcast licensee has a fundamental obligation to air programming responsive to the needs of its community.[6] The purpose of this core public interest programming obligation is to ensure that anyone with a television set has free access to a minimum level of programming responsive to a community's informational needs concerning local affairs, self-governance and educational programming, especially children's programming. Because this programming is so important, the broadcaster has an obligation to make it accessible to all Americans.

As part of the translation of existing obligations to the digital environment, UCC *et al.* urge the Commission to adopt specific quantitative minimum requirements concerning a digital licensee's programming obligations. A digital broadcaster's duty to provide programming responsive to the needs of its community of service is far too important to leave to the vicissitudes of the market. Clear guidelines setting forth the minimum amount of public affairs programming that a digital licensee must provide will ensure that members of the public have access to the programming necessary to be informed and active citizens of their communities.

---

[6] *See supra* note 1 and accompanying text. The importance of broadcasters covering significant local issues stems from the long-standing principle that because broadcasters are licensed to use a public space (the spectrum) for free, they should in turn serve the public as trustees of the spectrum. *See* 47 U.S.C. § 307(b); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 364, 380 (1969). *See generally Advisory Committee Report* at 17- 42 (discussing the history of the public interest standard and a broadcaster's duty to air programming addressing its community's informational and educational needs).

UCC *et al.* propose that the Commission establish specific guidelines concerning locally originated and oriented programming, political discourse, closed captioning, and children's educational programming.[7] Specifically, we urge the Commission to require: 1) three hours per week of local news and three hours per week of locally oriented programming outside of local news; 2) a reasonable amount of meaningful free time to federal and local candidates to enhance political discourse; 3) closed captioning on all public interest programming and the phasing in of video description to enhance disability access; and 4) minimum equal employment opportunity (EEO) recruitment and reporting requirements for DTV broadcasters. Additionally, the Commission must adopt meaningful disclosure requirements to enable the Commission and the public to easily determine if broadcasters are satisfying their public interest duties.

A. Minimum Public Interest Requirements are Necessary to Ensure that All DTV Licensees Air Programming Responsive to the Needs of their Communities.

The NOI asks if "there are sufficient marketplace incentives to ensure the provision of programming responsive to community needs, obviating the need for additional requirements." *NOI* at ¶ 22. The NOI also seeks comments on the costs and benefits of adopting minimum requirements for DTV licensees. *See id.* As discussed below, minimum quantifiable guidelines are necessary to preserve the public interest and will benefit broadcasters as well as the communities they are required to serve.

---

[7] With respect to the translation to digital of a broadcaster's core obligation to serve the educational and informational needs of the children of its community, we support the comments of CME *et al.* in this proceeding.

Evidence continues to demonstrate that some broadcasters simply do not meet their obligations to their communities. As the NOI noted, "an April 1998 Joint Report by the Media Access Project and the Benton Foundation found that, in the markets examined, 35% of the stations provide no local news, and 25% offer neither local public affairs programming nor local news." *NOI* at ¶ 36.[8] Over the last two years, coverage of local issues has not improved. In January 2000, over a two week period, the Benton Foundation conducted another study of 112 broadcast stations.[9] The study found that only 0.3% of total programming qualified as local public affairs programming. *See* Napoli, *supra* note 9, at 3. Adding national news coverage to the equation only raised the total to 1.06% of total broadcast hours. *See id.* In contrast, from 1973 to 1979, when the FCC did have programming guidelines, local public affairs programming made up on average 4.6 percent of station programming. *See Revision of Programming and Commercialization Policies,* 98 F.C.C. 2d at 1081. The Commission cannot allow the market to continue this downward trend into the digital age.

Minimum quantified public interest obligations address these market deficiencies by requiring that all licensees meet a minimum level of public service. Broadcasters have a core obligation to inform the public on issues of local importance and political discourse. This

---

[8]Another study of newscasts in the Denver area revealed that actual news coverage averaged less than half of the programs. *See* Rocky Mountain Media Watch, *1998 Survey: Not in the Public Interest,* <http://www.bigmedia.org/texts5.html> (last visited Mar. 13, 2000). Fifteen of the stations surveyed broadcast more commercials than news during their newscasts. *See Id. See also* Dan Trigoboff, *News Not Paramount*, BROADCASTING AND CABLE, Dec. 7, 1998, at 30 (four Paramount stations have eliminated newscasts for budgetary reasons).

[9] *See* Philip M. Napoli, Ph.D., *Market Conditions and Public Affairs Programming: Implications for Digital Television Policy*, at 2 (Mar. 2000) (submitted in this proceeding by the Benton Foundation and People for Better TV).

responsibility is essential to the functioning of an informed community and self-governance. It is too important to rely on the voluntary efforts of some responsible broadcasters. Each individual licensee agreed to serve the public interest in exchange for the use of the spectrum and thus minimum requirements are necessary to ensure that all licensees honor that obligation.

Moreover, clear, minimum requirements are fair. Numerous broadcasters "do not view these minimum standards as *regulation*." *Advisory Committee Report,* Separate Statement of John Goodmon at 86 (emphasis in original). Responsible broadcasters acknowledge that minimum requirements merely spell out how "[t]he broadcast company [can] fulfill[] a contract between itself as the user of a public asset and the public body that owns the asset." *Id.* The Commission owes a duty to the broadcasters who take their responsibility as public trustees seriously to make clear what is expected of a digital licensee. *See NOI,* Separate Statement of Commissioner Tristani, at 3. Failure to do so rewards the broadcasters who have neglected their public interest obligations, while discouraging those who have not.

Clear rules will also make the license renewal process more meaningful and certain. Adopting specific guidelines to ensure that broadcasters are meeting their obligations to their communities would enable the Commission to adequately determine whether a broadcaster's license has met the standards for renewal. Specific guidelines would therefore give substance to the Congressional requirement that broadcasters serve their local communities. *See* 47 U.S.C. §§ 307(b), 309(k).

For all of the aforementioned reasons, UCC *et al.* agree with the Advisory Committee that the Commission should adopt minimum public interest obligations for digital broadcasters. *See Advisory Committee Report* at 47-48. UCC *et al.*'s specific proposals concerning local

programming and candidate centered discourse, as well as closed captioning and EEO obligations and public disclosure requirements, are set forth below.

B. The Commission Should Adopt Local Programming Guidelines to Ensure that All DTV Licensees Serve the Local Programming Needs of their Communities.

As discussed above, the core public interest responsibility of a broadcaster is to air programming responsive to the informational needs of its community.[10] Notwithstanding the emergence of myriad media outlets, this responsibility remains extremely important because broadcast television is the only medium that is universally accessible to all Americans, is available for free, and provides locally originated and oriented programming. To ensure continued availability of accessible, free, local programming, the Commission should adopt processing guidelines requiring three hours per week of local news and three hours per week of locally originated or locally oriented public affairs programming.

1. Broadcast television remains the public's principal source of information concerning issues of local importance.

A broadcaster's duty to provide local programming is still as important as ever. Despite the explosion of media outlets over the last twenty years, broadcast televison remains the most ubiquitous medium, penetrating nearly every household in the United States, available at no cost, and reaching all demographic groups. *See* Review of the Commission's Regulations Governing Televison Broadcasting, *Report and Order*, FCC 99-209, at ¶ 40 (rel. Aug. 5, 1999) ("*Local*

[10] *See supra* notes 1 & 6.

Ownership Order").[11] Americans spend more time watching TV every day than radio, Internet, newspapers and magazines combined. *See* COMM. DAILY (March 3, 2000).

More importantly, television broadcasting is still the primary source that the American public turns to for news and information. *See Local Ownership Order* at ¶ 40. And the fact remains that only broadcast television delivers genuine local news and programming to communities across the U.S. on a regular basis.[12] As the Commission has recognized, "local programming, particularly news and public affairs, is the single program service that . . . remains primarily the domain of local broadcasters." Office of Plans and Policy Working Paper, *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd 3996, 4087 (1991). Although radio shares some qualities with broadcast television, it is not relied on as heavily as television for local news. *See Do You Read Me? More Media More Decisions*, *supra* note 12. Nor does radio offer significant amounts of local programming in light of the unprecedented wave of consolidation that has recently consumed the industry. *See* Andrew J. Schwartzman, *Viacom /CBS Merger: Media Competition and Consolidation in the New Millenium*, to be published in the forthcoming edition of the Federal Communications Law Journal.

Newer technologies - such as the Internet, cable and digital broadcast satellite (DBS) - are not universally available, are not free, and do not provide much original news or

---

[11] Statistics relied upon by the broadcasting industry show that 98% of U.S. households have at least one television receiver. *See* <http://www.nab.org/Research/Ribriefs/Presentations/keio/sld004.htm> (last visited Nov. 11, 1999).

[12] *See Americans Rely on Local Television News, Rate it Highly and Consider it Fair*, http://www.rtndf.org/issues/survey/htm> (last visited Mar. 23, 2000); *Do You Read Me? More Media More Decisions*, <http://www.ogilvypr.com/newsdesk/survey.html> (last visited Mar. 23, 2000).

informational programming on local issues. *Cf.* G.B. Sohn and A.J. Schwartzman, *Broadcast Licensees and Localism: At Home in the 'Communications Revolution,'* 47 FED. COM. L.J. 383, 386 (Dec. 1994). First, new media outlets are not as widely available as television. Only broadcast television has near universal availability, reaching 98% of American homes. *See Local Ownership Order* at ¶ 40. Second, unlike these other media, broadcast television is the only medium that remains freely available to all Americans. Third, none of these new media offer a substantial amount of local programming.[13] Thus, because broadcast television remains the only widely available and freely accessible medium that provides local programming, the FCC should adopt proceeding guidelines to secure this benefit for the public.

2. The Commission should adopt a processing guideline requiring three hours per week of local news and three hours per week of locally originated or locally oriented educational and/or public affairs programming outside of local news.

Accordingly, UCC *et al.* agree with the Advisory Committee conclusion that a "minimum commitment to public affairs programming should be required of digital broadcasters, again with some emphasis on local issues and needs." *Advisory Committee Report* at 48. Further, UCC *et*

---

[13] A recent study indicates that the Internet does not provide an adequate, additional source of local news and information to communities. *See* Children's Partnership, *Online Content for Low-income and Underserved Americans: The Digital Divide's New Frontier*, at 4 (Mar. 2000). In addition, cable television operators generally do not provide much original, local programming; the few local programming that is available on cable is usually run by local newspapers or local television stations and much of the content simply duplicates material found elsewhere. *See* David Liebermand, *The Rise and Rise of 24-Hour Local News,* COLUM. L. REV. at 54 (Nov. 1, 1998). Some local programming is provided on public educational and governmental access channels when it is required by local franchises pursuant to 47 U.S.C. § 531. Lastly, as a nationwide service, DBS has never provided locally-originated programming to the public. Even now, DBS simply retransmits local programming to viewers in the limited areas where it is supplying local programming. *See Clinton Signs SHVA*, 19 COMM DAILY 229 (Nov. 30, 1999).

al. support the proposal set forth by eleven members of the Advisory Committee recommending that the Commission adopt processing guidelines based upon three hours per week of local news and three hours per week of locally originated or locally oriented educational and/or public affairs programming outside of local news. *See Advisory Committee Report*, Separate Statement of Benton *et al.* at 72.

To ensure that large segments of the community are exposed to this programming, the guidelines should include three prerequisites. First, the programming must be aired on a free channel.[14] Second, the programming cannot be aired between 12:00 a.m. and 6:00 a.m. Third, at least one and a half hours of local news and locally oriented programming must be aired between 6:00 p.m. and 11:30 p.m. A broadcaster that airs this minimum amount of local programming would receive automatic approval of the portion of its license renewal application that addresses

---

[14] One of the overarching goals of the transition to digital is to preserve and promote "*free*, local television service using digital technology." *Fifth Report and Order,* 12 FCC Rcd at 12820 (emphasis in original). The provision of public affairs programming concerning issues of local importance lies at the core of this free service. *See id.* In order to preserve this public interest programming, along with the other free entertainment services rendered by local broadcasters, the Commission concluded that "it will require broadcasters to provide on their digital channel the free-over-the air-service on which the public has come to rely." *Id.* Thus, if a digital licensee provides only one channel, it must be freely available to the public and meet all of the licensee's minimum informational and educational programming obligations.

The NOI asks whether "a licensee has discretion . . . to air some of its public interest programming on more than one of its program streams." *NOI* at ¶ 11. UCC *et al.* believe that if a licensee decides to multicast, the Commission should allow the broadcaster to meet its public interest programming obligations on other program streams, so long as the programming meets the three conditions set forth above. This approach would grant broadcasters a reasonable amount of flexibility to air public interest programming. On a related point, the NOI asks if programming obligations should "attach to each program stream offered by the licensee." *NOI* at ¶ 11. In the multichannel environment, it may not be necessary to require public interest programming on every program service offered by a broadcaster. An across the board requirement of public interest programming on every program stream would discourage broadcasters from experimenting with various program lineups and schedules.

local programming. *Advisory Committee Report*, Separate Statement of Benton *et al.* at 72. This would make the license renewal process more efficient and certain.

Local programming guidelines give force to broadcasters' statutory obligation to serve their communities of license and are entirely consistent with "the core of this local licensing requirement . . . [that] broadcasters provide locally originated and locally oriented programming." *Advisory Committee Report* at 73.[15] The proposal ensures that "broadcasters that provide little or no local programming do not benefit from the free grant of spectrum in the digital world." *Id.* It also "would not burden those broadcasters who already provide adequate amounts of local news and programming." *Id.* This proposal is not without precedent; in fact, it is very similar to the guidelines adopted by the Commission with respect to children's educational and informational programming. *See* Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations, *Report and Order*, 11 FCC Rcd 10660, 10719 (1996).

C. The Commission Should Require DTV Licensees to Provide a Reasonable Amount of "Free Time" to National and Local Political Candidates under Conditions that Promote Discussion of Issues and Ideas.

In addition to providing locally originated and oriented public affairs programming, digital broadcasters should provide a minimum amount of candidate centered discourse in the period immediately prior to elections. As the NOI observes, "[t]he Commission has long interpreted the statutory public interest standard as imposing an obligation on broadcast licensees

---

[15] In fact, Congress has given broadcasters special treatment solely on the basis that they provide free local programming to the American public. *See* 47 U.S.C. §§ 521-529. *See also Advisory Committee* at 28.

to air programming regarding political campaigns." *NOI* at ¶ 34. The NOI seeks comment on ways in which candidate access to television and thus the quality of political discourse might be improved, and specifically seeks comment on the proposals of the Advisory Committee and others regarding candidate free time. *See NOI* at ¶¶ 34, 38.

1. A free time requirement is consistent with and furthers core First Amendment values.

UCC *et al.* urge the FCC to require broadcasters to provide free time for national, state and local political candidates. A minimum requirement of free time for all political candidates is essential to maintaining an informed electorate and furthering the First Amendment rights of the candidates and the citizens they wish to speak to. *See Red Lion*, 395 U.S. at 390 (*citing Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)) ("[s]peech concerning public affairs is more than self-expression, it is the essence of self-government"). More and more candidates rely on television ads to get their message across to voters.[16] And Americans still continue to cite television as one of their primary sources of election information.[17]

---

[16] *See* Common Cause Report, *Channeling Influence: The Broadcast Lobby & the $ 70 Billion Free Ride,* <http:www.commoncause.org/ publications/040297_rpt6.htm> (1997); Paige Albiniak, *Campaign 2000, The Color of Politics: Competitive Presidential Primaries and Congressional Races to Come Mean Big Bucks for TV, Radio*, BROADCASTING & CABLE, Feb. 28, 2000, at 20 ("Candidates are realizing what many traditional advertisers have known for a long time: Geographic target marketing on local TV stations can be a very effective advertising and promotional strategy.").

[17] *See* Rebecca Fairley Raney, *Scholars Weigh Internet's Effect on Campaigns,* N.Y. TIMES, Dec. 4, 1998 (reporting that seventy-eight percent of the people surveyed relied on televison as their primary source of election information); David Ho, *Poll Finds Americans Turn Away from Traditional News Sources*, The Deseret News, at WEB (Feb. 6, 2000) (discussing how despite a decline, three quarters of people surveyed still relied on television for recent presidential campaign coverage).

A political campaign is an exorbitant expense for any candidate, federal and state alike. And as reported by Common Cause, "[a]n enormous amount of [campaign funding] goes straight into the pocket of broadcasters." Common Cause Report, *supra* note 16. In fact, television is one of the single largest campaign expenses.[18] The Television Bureau of Advertising estimates that TV broadcasters alone will take in $600 million in the 2000 election year. Albiniak, *supra* note 16. This is an increase from the $447 million combined radio and television ad spending in the 1996 election. *Id.* Many qualified candidates, however, cannot afford to purchase time on television, thereby depriving the public from exposure to a number of diverse candidates. *See Advisory Committee Report* at 56. This lack of access and the resulting dearth of choice are obstacles that strike at the core of informed self-governance. *See* Common Cause Report, *supra* note 16. A free time requirement would help to break this cycle by allowing more candidates to express their views to the public and by increasing citizen's choice. As the Advisory Committee notes, "[e]ngagement with serious issues can be educative; it can increase citizen involvement in political issues; it can make citizens better able to choose." *See Advisory Committee Report* at 57. Not only would free time make for better democracy, it is well within the Commission's authority to require it. *See FCC v. League of Women Voters of Calif.*, 486 U.S. 364, 375 (1984); *see also Comments of the Alliance for Better Campaigns*, submitted in this proceeding.

Interested groups have already submitted recommendations for political free time to the Commission. For example, the Separate Statement of Benton *et al.*, in a part joined by the

---

[18] *See, e.g.,* Kevin Taglang *Digital Beat Extra, Television: Super Tuesday's Big Winner* (Mar. 7, 2000) (discussing that the race for the open Senate seat in New York will cost an estimated $45 million with 80% of the spending going to television ad buys; eleven governors' races will cost an estimated $3-20 million with 70% of the budget going to broadcast media).

majority of the Advisory Committee, recommends that the Commission require broadcasters to provide free time to national and local candidates for candidate-centered discourse, at least one minute in duration, with the candidate appearing in no less than half of the segment. *See Advisory Committee Report,* Separate Statement of Benton *et al.* at 70. This free time would be available 60 days before a general election, and could be limited by a "time bank" or "voucher" model. *See Advisory Committee Report,* Separate Statement of Benton *et al.* at 70-71. Another worthwhile proposal highlighted by the NOI is the Petition for Rulemaking filed by Henry Geller *et al.* *See NOI* at ¶ 38. UCC *et al.* support these proposals, as well as any other, that provide mandatory and meaningful free time for candidate-centered discourse.

2. Voluntary efforts are insufficient to further these values.

A reasonable amount of mandatory political free time is also necessary because voluntary efforts are insufficient. The majority of broadcasters have not provided free time in the past. As noted in the NOI, "many television broadcasters are providing scant coverage of local public affairs, and what coverage there is may be shrinking." *NOI* at ¶ 36.

Studies confirm this trend. One survey by the Center for Media and Public Affairs found that coverage of political campaigns by TV network news declined forty-four percent in fall 1999, compared with the same 1995 period. *See* COMM. DAILY (Jan. 24, 2000). A recent study conducted by the Alliance for Better Campaigns estimates that despite competitive races in both major parties, the major networks aired just 34 seconds of candidate discourse each night during the month of January. *See* Alliance for Better Campaigns, *Network Viewers Get Fleeting Glimpses of Presidential Hopefuls, Study Finds*, <http://www.bettercampaigns.org/documents/rele022300.htm> (last visited Mar. 13, 2000). Thus, relying on the largesse of

broadcasters will not serve the public interest and the Commission should require broadcasters to offer free time to political candidates.

D. The Commission Should Expand Accessibility Requirements to Ensure that All People Have Access to Public Interest Programming.

In addition to seeking comment on whether free time for political candidates should be required, the NOI also asks whether more extensive minimum accessibility requirements should be imposed on digital television broadcasters. *See NOI* at ¶ 26. UCC *et al.* recommend that the Commission should expand closed captioning requirements to encompass all public interest programming and that the FCC phase-in video description requirements for digital licensees.

The NOI requests comment on whether different requirements with regard to closed captioning should be imposed on DTV broadcasters. *See NOI* at ¶ 26.[19] The Advisory Committee suggested that broadcasters expand captioning on Public Service Announcements (PSAs),[20] public affairs programming, and political programming. *See Advisory Committee Report* at 62.

---

[19] Present regulations require broadcasters to caption 100% of "new" television programming by January 1, 2006, and 75% of "pre-rule" programming by January 1, 2008. *See* 47 C.F.R. § 79.1(b). Programs formatted for display on digital television are considered "pre-rule" programming, until the regulations requiring digital television receivers to be equipped with decoder circuitry designed to display closed captioning go into effect. *See* 47 C.F.R. § 79.1(a)(6). When those regulations go into effect all subsequent programming formatted for display on digital television will be considered "new" television programming. *See id.*

[20] Under current rules, PSAs of ten minutes or less are specifically exempt from closed captioning requirements. *See* 47 C.F.R. § 79.1(d)(6). Because PSAs are short and have a high repeat value, the cost of captioning would be small related to the benefit of allowing deaf and hard of hearing individuals to receive these important announcements.

UCC *et al.* agree with the Advisory Committee that these types of public interest programming should be made accessible to persons with disabilities. Indeed, the Commission should require that all public interest programming required by the FCC be made accessible. For example, if the Commission requires digital broadcasters to provide three hours of locally originated programming, as we propose, it should further require that this programming be captioned so that it is accessible to all Americans, including those who are deaf or hearing hearing. Under the current rules, however, some of this programming could fall under the exemption for locally produced non-news programming with limited repeat value. *See* 47 C.F.R. § 79.1(d)(8). The Commission must either rescind this exemption or clarify that it does not apply to the required three hours of local programming. To exempt local programming from closed captioning requirements would frustrate the goal of "provid[ing] persons with hearing disabilities with the same opportunities to share in the benefits provided by television programming that is available to others." *See* Closed Captioning and Video Description of Video Programming, *Report and Order*, 13 FCC Rcd 3272, 3277(1997) ("*Video Programming Order*").[21]

The Commission should also take steps to ensure access for the blind. The NOI requests comment on how to encourage DTV broadcasters to take advantage of the enhanced capabilities of digital technology to provide video description. *See NOI* at ¶ 27. The Advisory Committee

---

[21] Likewise, any free time for political candidates should be captioned. Arguably, such programming might fall under the exemptions for advertising under five minutes or PSAs of ten minutes or less. *See* 47 C.F.R. §§ 79.1(a)(1), 79.1(d)(6). The Commission should clarify that any free time for political candidates does not fall into one of these exemptions. Failure to do so would exclude the deaf and hard of hearing from an important element of the political process.

recommended that DTV broadcasters allocate sufficient bandwidth for the transmission and delivery of video description. *See Advisory Committee Report* at 62. UCC *et al.* agree that digital broadcasters should be required to set aside a portion of their bandwidth for the purpose of providing video description.[22] One of the advantages of digital television is its ability to include video description in one of the multiple audio channels that are part of the digital bandwidth. *See Advisory Committee Report* at 62. However, unless a sufficient portion of that bandwidth is set aside for video description, digital television programming may develop to the exclusion of blind individuals. Broadcasters would then be required to retrofit their systems to include room for video description, which would be much more costly. *Cf.* Karen Peltz Strauss and Robert E. Richardson, *Breaking Down the Telephone Barrier - Relay Services on the Line*, 64 TEMP. L. REV. 583 (1991) (discussing the social and monetary costs of retrofitting the telephone system to be more accessible for the hearing and speech impaired). Thus, it is vital that the Commission require a portion of the audio channels be set aside for the purpose of including video description.

E. The Commission Should Strengthen Minimum EEO Recruitment and Reporting Requirements for DTV Broadcasters.

Another minimum obligation intrinsic to the public interest standard is a broadcaster's responsibility to cast as wide and diverse a net as possible in its employment recruiting efforts. *Review of the Commission's Equal Employment Opportunity Rules and Policies and Termination*

---

[22]Analog broadcasters currently broadcast video description on the Secondary Audio Programming ("SAP") channel. *See* Implementation of Video Description of Video Programming, MM Docket No. 99-339, *Notice of Proposed Rulemaking*, FCC 99-353 at ¶ 10 (rel. Nov.18, 1999).

of the EEO Streamlining Proceeding, MM Dkt. No. 98-206, FCC 00-20 at ¶ 3-4 (rel. Feb. 2, 2000) ("*EEO Order*"). To this end, the NOI asks how the Commission should "encourage diversity in broadcasting consistent with relevant constitutional standards." *NOI* at ¶ 33. Recently, the Commission released an order revamping its EEO Rules and Policies. *See generally EEO Order*. The transition to digital in no way lessens a licensee's equal employment obligations.

In fact, in light of DTV's new opportunities, the Commission and the industry should explore new ways to address the paucity of minorities and women in the broadcast industry. *See Advisory Committee Report* at 63-64. One way the Commission could improve a DTV licensee's outreach and recruitment efforts is to require licensees to broadcast on-air notifications of vacancies. With the increased capacity of DTV, this requirement should not be burdensome. Another way to improve efforts would be to ask licensees to use DTV's interactive capacity to assist the public in finding out about vacancies and to electronically file their EEO reports with the Commission.

F. The Commission Should Require All DTV Broadcasters to Maintain Meaningful and Detailed Periodic Reports of Their Public Interest Programming and File them Electronically with the Commission.

Minimum public interest requirements should be complemented by an effective monitoring system. Public disclosure is an essential element in ensuring that broadcasters meet their minimum public interest obligations. The NOI asks what types of information about programs and other activities broadcasters should be required to disclose to the public. *See NOI* at ¶ 16. The Advisory Committee recommended that broadcasters be required to identify and describe their local public interest programming, when it was aired, and how the programming

fulfills their responsibility to meet the local informational and educational needs of their communities. *See Advisory Committee Report* at 45.

UCC *et al.* agree with the Advisory Committee that public disclosure should be required. Substantive disclosure requirements promote public awareness of a broadcaster's compliance, or noncompliance, with its requisite duty to serve the community. To this end, UCC *et al.* propose that the FCC require broadcasters to file detailed periodic reports documenting their compliance with their minimum public interest obligations.[23]

The NOI also asks how broadcasters could use the Internet to be more responsive to the needs of the public. *See NOI* at ¶ 17. Public disclosure is essential to the relationship between broadcasters and their communities, and the FCC should update current regulations to reflect digital technology's potential to improve these relations. The Advisory Committee recommended that broadcasters be required to electronically file periodic reports. *See Advisory Committee Report* at 45. One broadcaster sitting on the Advisory Committee recommended that the Commission require all broadcasters to post these reports on the licensee's web site and broadcast them over the air. *See Advisory Committee Report*, Separate Statement of James Goodmon at 87.

The FCC should adopt these recommendations. The current rules allowing licensees to maintain public inspection files on computers and encouraging them to post them on their web

---

[23] Current regulations, including maintaining quarterly issues and program lists in a public file, do not adequately describe programming, nor the quantity provided, nor how that programming is meeting public interest obligations. *See* 47 C.F.R. § 73.3526(e)(11)(i). As a result of the current rules, a community cannot sufficiently hold broadcasters accountable for satisfying their public interest obligations to their communities, the very reason for receiving the broadcast license in the first place.

sites are insufficient. It is relatively simple and inexpensive for the FCC to require a digital licensee to post these files on their web sites.[24] This simple procedure would make the public inspection files more easily accessible. The Commission should also post a link to the filed reports on its own web site. In addition, the Commission should require broadcasters to regularly broadcast on-air notifications of the contents of the quarterly reports and where they can be obtained.

Quarterly filing, Internet posting and on-air notification requirements would all have to be met as a condition of the broadcaster's license renewal. Strong public disclosure regulations will better enable the public to determine if broadcasters are meeting their obligations to serve their communities, as well as encourage licensees to follow these rules. As the Advisory Committee stated, "[g]reater availability of relevant information will increase awareness and promote continuing dialogue between digital television broadcasters and their communities and provide an important self-audit to the broadcasters." *Advisory Committee Report* at 46.

III. THE COMMISSION SHOULD ADOPT A RANGE OF ADDITIONAL PUBLIC INTEREST OBLIGATION OPTIONS THAT GIVE DTV BROADCASTERS FLEXIBILITY TO USE THE ENHANCED CAPABILITIES OF MULTICASTING IN A MANNER THAT BEST SERVES THEIR COMMUNITIES.

As discussed above, minimum public interest requirements should apply to all DTV broadcasters, regardless of how they use the spectrum. In light of DTV's new capabilities, however, the Commission should adopt additional public interest obligations commensurate with how a broadcaster decides to use the digital spectrum. The NOI asks how public interest

---

[24] Broadcasters are already required to post their public EEO file on their website. *EEO Order* at ¶ 124.

obligations apply to a digital broadcaster who chooses to multicast. *See NOI* at ¶ 11. UCC *et al.* agree with the gravamen of the Advisory Committee's conclusion that a DTV broadcaster that multicasts incurs additional public interest obligations, but should have the flexibility to choose from a range of options to satisfy its enhanced public interest requirements. As discussed below, we propose that a digital licensee can satisfy its additional public interest obligations by either providing additional public interest programming, leasing a portion of its spectrum to an independent voice, or paying a fee to a fund that supports noncommercial programming.

A. Because the Current Regulatory Regime is Based on the Assumption that a Licensee Will Only Provide One Channel, the Commission Must Update Public Interest Obligations to Reflect Multicasting.

Existing public interest obligations were developed under the analog system, and are therefore shaped by the inherent limitations in that technology. *See Fourth Further Notice of Proposed Rulemaking/Third Notice of Inquiry*, 10 FCC Rcd 10541,10546 (1995); *Fifth Report and Order*, 12 FCC Rcd at 12829. The current rules, based on the assumption that a licensee provides a single channel of programming, will not satisfy the public's needs in the digital environment. The Commission has a duty to formulate and revise its public interest policies to reflect changed circumstances in the digital era. *See CBS v. DNC*, 412 U.S. at 118 ("[the FCC] must adjust and readjust the regulatory mechanisms to meet changing problems and needs"); *accord Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969). In light of DTV's new capacity to serve communities in ways unimaginable in the era of analog,[25] the Commission should require broadcasters to take advantage of these new capabilities in serving the public

[25] *See Fifth Report and Order*, 12 FCC Rcd at 12828 (recognizing that digital technology requires re-conceptualization of public interest obligations in light of new capabilities).

interest.[26]

The Advisory Committee proposed that since broadcasters who choose to multicast may reap enhanced economic benefits, they "should have the flexibility to choose between paying a fee, providing a multicasted channel for public interest purposes, or making an in-kind contribution." *Advisory Committee Report* at 54.[27] UCC *et al.* agree with the Advisory Committee recommendation that DTV broadcasters who multicast should have flexibility to choose among a variety of options to serve the public interest.

UCC *et al.* propose that a DTV broadcaster choosing to multicast be given three options to satisfy its additional obligations: (1) provide more noncommercial, public interest programming; (2) lease a portion of its spectrum to either a small disadvantaged business or a noncommercial educational programmer; or (3) pay a fee to a fund that supports local noncommercial programming. This range of options, discussed below, enables the broadcaster to choose what is best suited for its community of service.

---

[26] While the Advisory Committee also suggests that these new obligations would not apply to digital broadcasters until they reached a specified revenue level, eleven members disagreed: "Additional public service obligations should be commensurate with these additional benefits, and should not be conditioned on whether those services generate a predetermined amount of revenue or profit." *Advisory Committee Report,* Separate Statement of Benton *et al.* at 73. Moreover, the eleven members concluded that consideration of revenues is "unwarranted in light of the fact that broadcasters have been given multiple billions of dollars worth of public airwaves, at no cost, to convert to digital TV." *Id.* at 74. UCC *et al.* urge the Commission to adopt the approach advocated in the Separate Statement of Benton *et al.*

[27] The Advisory Committee recommended charging a fee to multicasting broadcasters that would support noncommercial programming. If a broadcaster did not want to pay that fee, it could opt to either provide a specified amount of noncommercial, public interest programming or to lease a portion of its spectrum to a noncommercial programmer. *See Advisory Committee Report* at 54-55.

B. Broadcasters Should Have the Option of Satisfying Additional Public Interest Obligations by Dedicating a Portion of their Spectrum to Public Interest Programming.

The Commission should give broadcasters the option to provide additional programming that serves the public interest. The type of programming that would qualify could be defined broadly to include news, discussions of public affairs, programming related to political campaigns or ballot issues, locally oriented or originated programming, programming for underserved communities, educational or informational programming, and children's educational programming.[28]

A broadcaster would have two alternatives under this option: (1) it could dedicate one channel to public interest programming that would be available to the public for free; or (2) it could elect to air one hour of additional public interest programming on any of its free channels for every five hours of multicasted programming.[29] If a broadcaster chooses the second alternative, it would have to air the public interest programming on a free channel at times when a reasonable audience would be available, *e.g.*, between 7:00 a.m. and midnight.

The option of providing additional public interest programming is flexible on several levels. It permits a broadcaster to determine the needs of its community and what type of programming would best serve its viewers. For example, a broadcaster could provide an amalgam of local, children's educational, and political programming, or it could dedicate an

---

[28] Although all such programming need not be noncommercial, the Commission should take steps to encourage the provision of noncommercial programming.

[29] This is the equivalent of 20% of total programming and is consistent with the option of dedicating one of five multicasted channels to public interest programming.

entire channel to one of these types of programming. Broadcasters would be free to choose the types of programs and what subjects and viewpoints would be presented. This option also recognizes the different conditions in different local markets. Broadcasters in larger markets may find it more reasonable to set aside an entire channel for public interest programming, while broadcasters in smaller markets may find it more reasonable to provide additional hours of public interest programming.

C. To Increase the Diversity of Voices on the Airwaves, Broadcasters Should Have the Option of Leasing a Portion of Their Spectrum to a Small Disadvantaged Business or Noncommercial Educational Programmer.

Instead of providing additional public interest programming, a DTV broadcaster engaged in multicasting could choose to lease a channel or certain number of hours to either a small disadvantaged business (SDB)[30] or a noncommercial educational (NCE) programmer. This option has great potential to serve the public interest by increasing diversity of programming and creating opportunities for minorities, women and others that have previously had few opportunities to participate in broadcasting. *See Advisory Committee Report* at 63-64.

Under this option, broadcasters would have two alternatives; they could: (1) lease an entire channel (outside the direct editorial control of the licensee) to an SDB or local/national producer of NCE programming; or (2) lease time by the hour to an SDB or local/national producer of NCE programming. The amount of time would be a percentage of the number of

---

[30] The term SDB and the government program supporting it, is defined and discussed at *Small Disadvantaged Business- What We Do,* <http://www.sba.gov/sdb/section06c.htm> (last visited Mar. 20, 2000).

total hours of multicast programming.[31] Broadcasters would lease to an SDB or local/national producer at below market rates.

The option of leasing space to an independent voice furthers the fundamental First Amendment interest in promoting the "widest dissemination of information from diverse and antagonistic resources." *See Associated Press v. United States*, 325 U.S. 1, 20 (1945). Promoting diverse sources of information for the public is increasingly important in this era of unprecedented media market consolidation.[32] This option is a great opportunity to combat, at least partially, this wave of concentration by increasing the diversity of voices on the airwaves and the availability of NCE programming to the public. In addition, leasing spectrum to SDBs will promote service to under-represented segments of the community.

The leasing option also addresses the Commission's concern with the barriers to entry endemic to the broadcasting industry. *See NOI* at ¶ 29. Allowing broadcasters to lease a channel or portions of channels at reduced rates would be a good step toward alleviating the market entry and acquisition barriers that small, minority- and women-owned businesses face. Providing

---

[31] For example, under this option, the Commission could require a licensee to lease one hour to an SDB for every 15 hours it multicasts. Another possibility would be that the licensee could craft various arrangements with several SDBs, leasing various spots to several voices. Still other possibilities may be found in community agreements, where the local community could enter into an arrangement with the broadcaster to lease certain portions of time as a platform for local talent.

[32] *See, e.g.*, Mark Leibovich, *Old, New Media Joining Forces*, WASH. POST, Jan. 11, 2000, at A1 (AOL-Time Warner merger); Stephen Labaton, *Wide Belief U.S. Will Let a Vast Deal Go Through*, N.Y. TIMES, Sept. 8, 1999 <http://www.nytimes.com/library/financial/090899cbs-viacom-regulate.html> (Viacom-CBS merger); David Lieberman, *Firms waiting to exhale as FCC reconsiders ownership rules*, USA TODAY, Mar. 20, 2000, at 4B <http://www.usatoday.com/usatonline/ 2000320/2049002s.htm> (Tribune-Times Mirror merger and AT&T-MediaOne merger).

opportunities for SDBs through leasing is particularly important in light of the fact that only incumbent broadcasters received spectrum for DTV.

The leasing option is also consistent with obligations imposed on other multichannel video providers. The ability to multicast enables digital broadcasters to become multichannel providers, similar to cable television and digital broadcast satellite operators. And these multichannel providers have been required to set aside channels for public interest programming. For example, cable operators are required to make available between ten and fifteen percent of their channels for lease to unaffiliated programmers. *See* 47 U.S.C. § 532(b)(1).[33] In addition, cable operators are required, at the request of the local franchising authority, to provide channels for public, educational and governmental access. *See* 47 U.S.C. § 531. DBS broadcasters are also required to set aside four percent of their capacity for NCE programming. *See* 47 U.S.C. § 335; Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 13 FCC Rcd 23254, 23285 (1998). The rationale behind these requirements stems from Congress' belief that ensuring public access to all forms of electronic media is an important governmental goal. *See Time Warner v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996). The same rationale for leasing space for public use on cable and DBS applies to multicasting digital broadcasters.

D. Broadcasters Should Have the Option of Paying a Fee to Support Local Noncommercial Educational Programming.

Under the third option, a DTV broadcaster could pay a fee into a fund to support local

---

[33] The purpose of this leased access requirement is "to assure that the widest possible diversity of information sources are made available to the public." 47 U.S.C. § 532(a).

NCE programming in lieu of its additional public interest obligations. *See Advisory Committee Report* at 55. The fee could be equivalent to one percent of a licensee's total annual gross advertising revenues[34] or five percent of annual gross revenues derived from multicasting.[35] This "pay or play" option is an important component to promoting a flexible range of options for digital broadcasters. It furthers the important government interest of assuring that the public has access to diverse, quality noncommercial programming. *See Time Warner*, 93 F.3d at 976.

The pay option provides much needed funding for entities such as local PBS stations or other non-profit programmers, whose primary purpose is to provide programming meeting public needs rather than maximizing profits. It is a simple means of allowing a broadcaster to indirectly help provide more noncommercial programming to its community of service and thereby meet its enhanced public interest obligations.

The Communications Act grants the Commission a wide authority to regulate broadcasters in the public interest. Offering to a pay a fee as one of the many options a DTV

---

[34] *Cf.* Henry Geller, *Implementation of "Pay" Models and the Existing Public Trustee Model*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST 227, at 229 (1998) (discussing a "pay/public broadcasting" regulatory model where a licensee would no longer have any public interest obligations and instead pay 2% of gross advertising revenues and 2% of sales transactions into a public broadcasting fund). The 1% suggestion above incorporates the fact that DTV broadcasters would still have to meet a basic minimum of public interest obligations.

[35] *Cf.* Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, *Report and Order*, 14 FCC Rcd 3259 (1998) (concluding that a fee of 5% of gross revenues of a digital licensees fee based ancillary services was reasonable and would not discourage DTV broadcasters from using the their new capacity to offer new services). Similarly, in this case a 5% fee based on the gross revenues a DTV licensee generates from all multicasting services - free or pay - would be a reasonable return to the public in lieu of public interest obligations and would not dissuade broadcasters from providing more program streams.

broadcaster may elect to serve its community lies well within that broad authority and is reasonably related to the regulation of the licensee as a public trustee. Since paying a fee is optional, the Commission would not be imposing a mandatory fee. Rather, the pay option simply gives broadcasters an alternate way to satisfy their enhanced public interest obligations to the public.

IV. EXISTING PUBLIC INTEREST OBLIGATIONS SECURING CANDIDATE'S ACCESS RIGHTS AND PROTECTING CHILDREN FROM EXCESSIVE ADVERTISING MUST APPLY TO ALL ANCILLARY AND SUPPLEMENTAL PROGRAM SERVICES.

Multicasting allows DTV broadcasters to provide ancillary programming services in addition to their free channel or channels. The NOI asks whether "a licensee's public interest obligations apply to its ancillary and supplemental services." *NOI* at ¶ 13. We agree with People for Better TV that "[t]he public interest standard attends to all DTV uses of the spectrum." PBTV Petition at 5. The plain language of 47 U.S.C. § 336 indicates that all program services, including ancillary and supplemental, must be in the public interest.[36] Section 336(d) explicitly states that a "television licensee shall establish that *all of its program services* on the existing or advanced spectrum are in the public interest." 47 U.S.C. § 336(d) (emphasis added). A broadcaster must serve the public interest on all of its program services, including ancillary and supplemental, or the clause "all of its program services" would have no meaning.[37] Thus, it is clear that existing public interest obligations apply to ancillary and supplemental program

---

[36] Part V *infra*, will discuss how the public interest standard applies to non-programming ancillary services such as datacasting.

[37] *See also* 47 U.S.C. §§ 336(a)(2).

services, as well as free-over-the-air services.

As discussed below, the existing public interest obligations concerning candidate access rights and children's advertising limits must be applied to all programming services, whether free or pay.[38] Failure to apply these obligations to ancillary program services would frustrate the underlying goals of these fundamental obligations.

A. DTV Broadcasters Must Comply with the Statutory Mandates of Equal Opportunities and Reasonable Access on All Program Services.

The NOI asks how a broadcaster's obligations to provide equal opportunities and reasonable access to candidates translates into the digital environment. *See NOI* at ¶ 11. Simply put, these rules should apply across the board to all program services. Any other interpretation of the statutory mandates of candidate access rights would conflict with the letter of the law and the Commission's implementing rules and precedent.

1. The FCC should clarify that Section 315(a) of the Communications Act requires digital licensees to provide equal opportunities to all political candidates on all program services.

Section 315(a) of the Communications Act requires a broadcaster that permits any political candidate to use its facilities to provide equal opportunities to all other such candidates for that office. 47 U.S.C. § 315(a). "The basic purpose of section 315(a) is to permit the 'full and unrestricted discussion of political issues by legally qualified candidates.'" *Becker v. FCC*, 95 F.3d 75, 82 (D.C. Cir. 1996) (citing *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360

---

[38] Closed caption requirements must also be met on all program services. The application of existing closed captioning requirements to ancillary programming services, as well as recommendations concerning access for non-programming ancillary services, is discussed *infra* at Part V.C.

U.S. 525, 529 (1959)). Section 315(a) "[p]revent[s] discrimination between competing candidates by broadcasting stations and cable operators." *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 69 F.C.C. 2d 2209, 2216 (1978) ("*Political Primer 1978*"). Under the Commission's rules, equal opportunities means that a broadcaster must "make available periods of approximately equal audience potential to competing candidates to the extent that is possible." *Political Primer 1984*, 100 F.C.C. 2d 1476, 1505 (1984).

Thus, any use by a candidate of any program service provided by a DTV broadcaster triggers a competing candidate's rights, and the licensee must then provide any competing candidate for that office an equal opportunity to use that service. A contrary application of the statute would allow broadcasters to discriminate among candidates for the same office. For example, if a broadcaster provides candidate A with the use of its "primary" channel, it must follow suit with candidate B. The digital licensee cannot delegate candidate B to a different channel. This would constitute illegal discrimination toward candidate B under section 315. *Cf. Becker*, 95 F.3d at 84 (discussing how if a licensee channels one candidate's message to "prime time" and the second candidate to "broadcasting Siberia," the latter would be denied the equal opportunity guaranteed by section 315). The same rationale applies if the broadcaster provides access to candidate A on the licensee's ancillary pay program service. To comply with section 315, the digital broadcaster must provide candidate B with an equal opportunity on its pay channel.

In addition, "the power to channel" not only confers "on the licensee the power to discriminate between candidates, it can force one of them to back away from what he considers to be the most effective way of presenting his position on a controversial issue lest he be

deprived of the audience he is most anxious to reach." *Becker*, 95 F.3d at 83. This danger is even greater in the digital environment where a broadcaster now has an array of program streams to channel a candidate's message. Thus, it is imperative that the Commission require all digital licensees to offer equal opportunities to all candidates on all their program services.[39]

2. The FCC should clarify that Section 312(a)(7) of the Communications Act requires digital licensees to provide candidates reasonable access to all program services.

The Commission must also clarify how § 312(a)(7) of the Communications Act applies to DTV. Under § 312(a)(7), broadcasters are required to provide federal candidates with "reasonable access" to their facilities during political campaigns. The purpose of this law is to ensure that "candidates for Federal elective office are given or sold reasonable amounts of time for their campaigns." *Political Primer 1978* at 2216. The Commission has set forth several general principles that seek to clarify what is considered reasonable. *See* Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, *Report and Order*, 68 F.C.C. 2d 1079 (1978) ("*Report and Order on 312(a)(7)*"). For example, a "licensee may not adopt a policy that flatly bans Federal Candidates from access to the types, lengths and classes of time which they sell to commercial advertisers." *Id.* at 1094; *see also CBS v. FCC*, 453 U.S. 367, 382 (1981) (describing the Commission's "rule of reason" with respect to bans on candidate advertising).[40]

---

[39] "It was the intent of Congress to insure complete freedom of expression by political candidates, and therefore the no-censorship provision of Section 315 prohibits *any interference, direct or indirect, with such expression.*" *D. J. Leary*, 37 F.C.C. 2d 576, 578 (1972) (emphasis added).

[40] It is also impermissible for a licensee to refuse "to sell or give prime-time programming to legally qualified candidates." Licensee Responsibility under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971, 47 F.C.C. 2d 516,

Consistent with these principles, a DTV licensee must grant federal candidates reasonable access to all of its program services, including ancillary or supplemental. Similarly, the Commission cannot allow DTV broadcasters to segregate candidate-centered programming to a lesser viewed program stream. Candidates "target specific voting groups with television advertisements." *Becker*, 95 F.3d at 80 (citations omitted). A digital licensee who refuses to sell or give time to a candidate on its ancillary pay service or agrees to sell time to a candidate only on the licensee's less popular channels impermissibly interferes with the candidate's campaign strategy. Such a practice is unreasonable and hence unlawful under § 312(a)(7). *See Becker*, 95 F.3d at 80 (citing *CBS*, 453 U.S. at 389).

The Commission should also require digital licensees to provide reasonable access to local and state candidates. The reasonable access requirement "does not exempt stations from making time available to candidates for non-Federal offices." *Political Primer 1978* at 2286. Licensees have a duty inherent in their obligation to serve the public interest to present local political issues. *See Report and Order on 312(a)(7)*, 68 FCC Rcd at 1087-1088. The presentation of political broadcasting concerning local affairs is "vital to the proper functioning of our Republic." *Licensee Responsibility as to Political Broadcasting*, 15 F.C.C. 2d 94, 94 (1968). This existing obligation continues into the transition to digital. But in light of DTV's new capabilities, the Commission should go one step further. In the analog era, broadcasters argued that it was impractical to require a broadcaster to provide access for all local candidates because it was difficult to accommodate a large number of candidates on a single channel.

---

516 (1974).

However, since DTV allows broadcasters to transmit more than one channel, this problem can be alleviated. With the extra room, DTV broadcasters now have the space to accommodate state and local candidates and the Commission should require them to do so.

At minimum, the Commission should extend its "rule of reason" prohibiting bans on sales to federal candidates to encompass state and local campaigns. The Commission should adopt the recommendation of the Advisory Committee that the "FCC should prohibit broadcasters from adopting blanket bans on the sale of time extended to all State and local political candidates." *Advisory Committee Report* at 60; *see also NOI* at ¶ 38. As discussed above, broadcasters have a responsibility to inform their communities on issues of local political importance. For a broadcaster to ban all local candidates from advocating their candidacy on its airwaves is patently unreasonable and in violation of this duty.

B. DTV Broadcasters Must Comply with the Commission's Rules Protecting Children from Excessive and Unfair Advertising on All Program Services.

The Commission asks how the policies set forth in the Children's Television Policy Statement should be applied in the digital environment. *See NOI* at ¶ 12. The Children's Television Act of 1990 and implementing regulations and policies concerning children's advertising limits, host-selling and program length commercials must be applied to all program services. Policies such as commercial advertising limits were instituted to protect children while watching television. It makes no difference to a child whether the program she is watching is analog or digital, free or pay. Unfair commercial practices can have the same harmful effects, regardless of the platform. The crucial issue is not what channel the programming is on, but whether it is aimed at children. And if it is aimed at children, then it must be subject to the rules

pertaining to children's broadcasting, whether it is on a free or ancillary or supplemental program service. These issues are discussed more fully in CME *et al.*'s Comments.

V. THE COMMISSION SHOULD REQUIRE DTV LICENSEES THAT PROVIDE ANCILLARY AND SUPPLEMENTARY SERVICES TO SATISFY PUBLIC INTEREST OBLIGATIONS ON THOSE SERVICES.

As discussed above, a digital broadcaster must meet certain existing public interest requirements on its ancillary and supplementary program services, *i.e.*, pay services. The NOI also asks whether public interest obligations attach to non-programming ancillary and supplemental services. *See NOI* at ¶ 13. Section 336(a)(2) explicitly directs the Commission "to adopt regulations that allow holders of [DTV] licenses to offer such ancillary and supplemental services . . . as may be consistent with the public interest, convenience, and necessity." 47 U.S.C. § 336(a)(2).[41] So the question is not whether ancillary and supplemental services should serve the public interest, but how.

In this section, UCC *et al.* address the public interest obligations that should apply to DTV broadcasters that use the spectrum to provide non-programming ancillary services, such as datacasting. Digital broadcasters could meet their public interest obligations by providing a certain amount of datacasting services to local schools and libraries and non-profit community organizations. The Commission should also explore the possibility of allowing digital licensees to meet their public interest obligations on ancillary services by providing broadband Internet access to needy schools, libraries, and/or community centers. In addition, the Commission must

---

[41] In addition, section 336(b)(5) directs the FCC to prescribe regulations for ancillary or supplemental services including "such *other* regulations as may be necessary for the protection of the public interest, convenience, and necessity." 47 U.S.C. § 336(b)(5)(emphasis added).

ensure that all ancillary and supplemental services, programming and non-programming, are accessible to the disabled.

A. DTV Licensees Should Be Required to Set Aside a Minimum Portion of Their Spectrum to Transmit Data on Behalf of Local Public Interest Organizations.

The NOI asks how datacasting could count toward a digital broadcaster's public interest obligations. *See NOI* at ¶ 13. Specifically, the Commission asks about the Advisory Committee's proposal that broadcasters choosing to datacast should transmit information on behalf of local schools, libraries, community-based organizations, governmental bodies, and public safety institutions. *See Advisory Committee Report* at 49.

The ability of digital broadcasters to datacast information over the digital spectrum creates enormous potential for broadcasters to better serve their communities. *See Advisory Committee Report* at 53. For example, with less than one percent of the digital spectrum, broadcasters are able to transmit data regarding weather, public safety and health, governmental activities, and educational programming, to name a few. *See id.* Because of this vast potential to serve the public interest, the Advisory Committee recommends that broadcasters work with local educational and public safety institutions to provide community datacasting services. *See id.* UCC *et al.* support the Advisory Committee's recommendations.

B. The Commission Should Explore the Possibility of Allowing DTV Licensees to Satisfy a Portion of their Public Interest Obligations by Providing Broadband Internet Access to Needy Schools, Libraries and/or Community Centers.

In addition to one-way datacasting, recent studies and articles indicate that digital broadcasters may be able to use the additional spectrum to link up Internet Service Providers

(ISPs) and provide wireless Internet connections of some fashion.[42] This link will permit digital broadcasters to fully integrate into the Internet infrastructure, offering the Internet through the television set. *See* Ducey, *supra* note 3. Digital broadcasters will be able to reap additional profits from expanding to wireless communications, getting far more use and economic value out of the digital technology than they first anticipated. *See id.*

The possible capability of a digital broadcaster to use the spectrum as a digital "pipe" raises other potential ways that a licensee can serve its community. For example, there is the possibility that a DTV broadcaster could help bridge the digital divide in its community by providing broadband Internet access to local schools, libraries and community centers. UCC *et al.* recommend that to the extent that some broadcasters do actually use their digital capacity to provide some form of broadband Internet access, the Commission should apply open access, non-discriminatory principles to these services. UCC *et al.* urge the Commission to explore all the opportunities that lie in DTV's datacasting capabilities to better serve the public interest.

C. The Commission Should Ensure that All Ancillary and Supplemental Programming and Non-Programming Services Are Accessible to Persons with Disabilities.

The NOI asks what could be done to make all ancillary and supplemental services accessible to individuals with disabilities. *See NOI* at ¶ 28. First, it is clear that if the ancillary or supplemental service is a program service, *e.g.*, pay channel, the existing captioning rules apply. *See* discussion *supra*, Part IV. As the Commission has previously stated, the video programming accessibility requirements "apply to *all* types of video programming delivered

---

[42]*See* Ducey, *supra* note 3; Dickson, *supra* note 4; Healey, *supra* note 4.

electronically to consumers, regardless of the entity that provides the programming or the category of programming." *Video Programming Order,* 13 FCC Rcd at 3276. (emphasis added) A DTV broadcaster who multicasts becomes a multichannel video programming distributor ("MVPD"). As an MVPD, a DTV broadcaster is required to meet closed captioning requirements for all types of programming services it offers, whether free or pay. *See id.*; 47 C.F.R. § 79.1(b).

Second, with respect to non-programming ancillary or supplemental service, UCC *et al.* agree with the Advisory Committee's recommendation that the Commission should explore ways of expanding disability access to any new service that digital licensees provide through the digital bandwidth. *See Advisory Committee Report* at 62. In addition, the Commission should ensure that ancillary services do not impinge on the bandwidth currently set aside for closed captioning.

VI. THE COMMISSION SHOULD ESTABLISH BASIC SAFEGUARDS TO PROTECT CONSUMER PRIVACY FROM THE POTENTIAL INVASIVE AND ABUSIVE MARKETING PRACTICES IN DIGITAL TELEVISION.

The Commission should also guard against the potential of DTV to be used in ways contrary to the public interest. On the one hand, the interactive capabilities of DTV have tremendous potential to enhance educational and public affairs programming. Enhanced television allows educational programmers to "combine the storytelling power of video and film with the enormous data channel of a digital television signal." PBS Digital Television - Enhanced Programming Shockwave Demo, <http://www.pbs.org/digitaltv/enhanceNS.html> (last visited Mar. 15, 2000). A DTV broadcaster could enrich televised political debates or city council meetings by permitting the audience to directly interact with the candidates or officers.

However, the interactive potential of DTV also raises serious questions concerning consumer privacy. To protect consumer privacy, the Commission should adopt a rule that prevents DTV broadcasters from collecting personal information unless the consumer "opts-in" to the scheme after adequate notice.

A. Interactive DTV Poses a Serious Threat to Privacy.

DTV allows broadcasters to gather unprecedented amounts of personal information about people, including viewing and purchasing habits, and use that information to target advertisements to the consumer.[43] The DTV set top box can be assigned a number that allows the broadcaster, or third party, "to determine what is watched on the set, when, and for how long." Horn, *supra* note 42. The technology also allows the broadcaster to "gather data on how long [a viewer] spend[s] on which show, whether they link from the TV show to a Web Site, and even what they click on at the site." *Id.* Further, interactive technology allows for the collection of detailed personal data.[44]

Interactivity allows broadcasters to not only better target advertisements, but to make it possible for veiwers to directly purchase the advertised product.[45] Experimentation with

---

[43]*See* Bob Van Orden, *Top Five Interactive Digital-TV Applications*, Multichannel News, No.25, Vol.20, pg. 143 (June 21, 1999); Patricia Horn, *Interactive TV Making Strides; Ability to Gather Data Spurs Privacy Worries*, ARIZONA REPUBLIC, at D3 (Jan. 24, 2000).

[44]For example, during an advertisement for shampoo, viewers could be invited to press a button on their remote control which then takes them to an " interactive area . . . where they are asked about the color and thickness of their hair, and how often they wash it." David Pringle, *Interactive Media Change Rules of Broadcasting*, WALL ST J. EUR. 12 (Dec. 7, 1999); *accord* Marketing Week, *P&G to Test Interactive TV ads with C&W*, at 12 (Feb. 24, 2000).

[45]*See* Mark Cooper, *A Consumer Perspective on Economic, Social and Public Policy Issues in the Transition to Digital Television*, Report of CFA to People for Better TV (Oct. 29, 1999),

"impulse" buys like pizza is already bearing fruit.[46] According to some analysts, the combination of collecting information and using it to target ads to viewers "may prove to be the biggest money spinner of all-targeted advertising."[47]

The efficiency of such a targeting system is revolutionary for the advertising and mass media industries.[48] "The ability to respond with a remote control . . . is forecasted to drive the direct marketing industry to $30.8 billion by 2005." Morgan Stanley Dean Witter, *Digital Decade,* at 3 (Apr. 6, 1999). From a marketer's perspective, the combination of television and the Internet is a "marriage made in heaven."[49]

From the consumer's perspective, however, this ability to collect and utilize personal information is frightening. The public has already expressed grave concerns about the collection of personal information on the Internet.[50] These same concerns apply with greater force to

---

available at < http://www.bettertv.org/consumerperspective.htm> (discussing, *inter alia*, the ability of interactive DTV exploiting "impulse" oriented advertising at the expense of the consumer); Market Week, *Interactive TV to Encourage Impulse Buying*, at 20 (Jan. 13, 2000).

[46]*See* Robin Berger, *B3TV pays for Slice of e-pie*, ELECTRONIC MEDIA, at 14 (Aug. 30, 1999).

[47]*Id.* For example, "when the World Cup finals finishes imagine the potential of an on screen advert selling the official ball of the tournament . . . [i]t could be bought at the touch of a button." Martin Sims, *From Aiming too High to Aiming Too Low*, INTERMEDIA at 5 (June 1999).

[48] *See* Van Orden, *supra* note 42, at 145 ("[i]magine an electronic 'direct mail on steroids,' where advertising is matched so precisely to the profiles of likely purchasers that response rates routinely exceed 20 percent.").

[49] Publishing Technology Review, *TV Online Faces an Uphill Battle for those Eyeballs* (May 1, 1998).

[50] *See* Major R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware,"* 47 A.F. L. REV. 125 (1999); Electronic Privacy Information Center, *Privacy Surveys,*<http://www.epic.org/ privacy/ survey/html.> (last visited Mar. 26, 2000).

interactive DTV.

B. To Protect Consumer Privacy, the Commission Should Adopt a Rule Preventing DTV Broadcasters from Collecting Personal Information Unless the Consumers "Opt-in" after Adequate Notice.

In light of the amount of money at stake,[51] and the dangers to consumer privacy, it is imperative that the Commission act before the market fails to protect the privacy interests of consumers. The Commission should adopt rules to prevent broadcasters from using the interactive capabilities of DTV to violate consumer privacy.[52]

UCC *et al.* urge the Commission to adopt a DTV privacy policy that tracks the privacy protections cable operators must afford to subscribers. *See* 47 U.S.C. § 551. Cable operators must provide all subscribers with clear notice describing what personally identifiable information might be collected, how it may be disclosed, how long the operator retains the information, and where the subscriber may have access to such information if collected. 47 U.S.C. § 551(a)(1)(A)-(D). A cable operator is prohibited from collecting personally identifiable data without the subscriber's prior consent. 47 U.S.C. § 551(b)(1). Lastly, a subscriber has a right to access the data collected by the cable operator as well as the right to correct any erroneous information. 47 U.S.C. § 551(d).

There is no reason why consumers should have less privacy protection on digital

---

[51] *Cf.* Joel R. Reidenberg, *Restoring Americans' Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. 770, 775 (1999) ("[b]y 1998, the gross annual revenue of companies selling personal information and profiles, largely without the knowledge or consent of individuals concerned, was reportedly $1.5 billion").

[52] Special safeguards are needed to protect children from invasions of privacy and excessive and abusive advertising practices. To this end, UCC *et al.* endorse the proposals of CME *et al.*

television than on cable. The Commission should adopt similar rules to prevent DTV broadcasters from collecting consumers' viewing and purchasing habits without consumer consent. Consumer consent should only be valid after the digital licensee has given clear and understandable notice of what information is being collected and how it will be used. Similar to the cable protections, the Commission should pass regulations that give consumers the right to access data collected by the DTV licensee and the right to correct any erroneous information. The above four requirements - notice, consent, access, enforcement, and correction - are not only consistent with the privacy protection enjoyed by cable subscribers, but are consonant with general privacy principles applicable to all forms of consumer data collection.[53]

Moreover, a meaningful consumer interactive privacy regulation is good policy for business, as well as consumers. Consumers wary of compromising their privacy rights every time they turn on the television may simply turn their attention elsewhere. Protecting consumer privacy is good for the market because it increases consumer confidence.[54] The Commission also has the authority to adopt consumer privacy safeguards under its traditional statutory duty to ensure that broadcasters fulfill their roles as public trustees and act in the public interest. Indeed, § 336(b)(5) explicitly grants the Commission the authority to "prescribe *such other regulations*

---

[53] *See* Pippin, *supra* note 50, at 128-29 (discussing general consumer privacy principles in the context of data collection over the Internet). *See also* Sherman Fridman, *California Senator Proposes Interactive TV Privacy Legislation,* NEWSBYTES (Feb. 22, 2000) (discussing how proposed opt-in regulation of interactive DTV would be very similar to state and federal laws prohibiting video stores and libraries from sharing or selling customer information with third parties without first getting written consent from the customer); 47 U.S.C. § 222 (privacy requirements for telecommunications carriers).

[54] *See* Reidenberg, *supra* note 51, at 772 (discussing how fair privacy regulations are necessary conditions for the market to gain sufficient consumer confidence).

as may be necessary for the protection of the public interest, convenience and necessity." 47 U.S.C. § 336(b)(5) (emphasis added). It is beyond reproach that consumers have a right to protect personal information. Digital broadcasters licensed to serve the "public interest, convenience and necessity" must abide by that right and the Commission should enforce it.

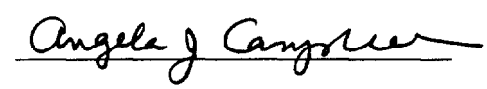
CONCLUSION

Both the Communications Act and good public policy demand that digital broadcasters meet public interest obligations on all of their services. The present public interest obligations, which were developed at a time when each licensee could broadcast only on a single, analog channel, are insufficient for the future. Enough is known about how broadcasters will use the expanded capacity and capabilities of digital to establish both mandatory minimum public interest requirements and additional public interests requirements that would vary depending upon community needs and how the spectrum is used. Adopting public interest requirements now will both provide helpful guidance to broadcasters in developing new services and ensure that the public benefits from the transition to DTV.

Thus, the Commission should issue an NPRM on the public interest obligations of digital licensees as soon as possible, but no later than August 2000. As described above, the NPRM should include five elements. First, it should set forth minimum public interest requirements for all licensees that include: 1) specific quantities of local affairs programming; 2) free time for political candidates; 3) children's educational programming; 4) expanded closed captioning and video description requirements; and 5) strengthened EEO outreach and reporting. Broadcasters should have to publicly document their compliance with these minimum requirements. Second, the NPRM should propose additional, flexible public interest obligations for digital broadcasters

choosing to multicast. Third, the Commission should clarify how equal opportunities and reasonable access requirements for political candidates and advertising protections for children apply to all DTV program streams. Fourth, the Commission should adopt rules ensuring that ancillary and supplementary services, such as datacasting and Internet access, are used to benefit the public and are accessible to people with disabilities. Finally, the Commission should take action to ensure that broadcasters do not use DTV's interactive capabilities to invade consumer privacy.

Respectfully submitted,



Angela J. Campbell
Citizens Communications Center
INSTITUTE FOR PUBLIC REPRESENTATION
Georgetown University Law Center
600 New Jersey, Ave. N.W., Ste. 312
Washington, D.C 20001

Andrew J. Schwartzman
Harold Feld
Media Access Project
950 18th Street, Ste. 220 NW
Washington, D.C. 20006

Counsel for UCC *et al.*

Of Counsel:

Fernando A. Bohorquez, Jr
Graduate Fellow
Georgetown University Law Center

Kristen Enge
Law Student
Georgetown University Law Center

Anthony Cavalluzzi
Law Student
Georgetown University Law Center

March 27, 2000